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No. 373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

SYLVANIA ELECTRIC PRODUCTS INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

and

LOCAL 352, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement of the case	3
A. Nature of the proceeding	3
B. The earlier *Sylvania* case	3
C. Statement of facts	4
D. The decision of the trial examiner and Board	10
E. The decision of the court below	11
Reasons for granting the writ	13
Conclusion	23
Appendix A	1a
Appendix B	4a

CITATIONS

CASES:

Boston Herald-Traveler Corp. v. *National Labor Relations Board*, 223 F.2d 58 (CA1)	17
Electric Furnace Co., 137 NLRB 1077, 1080	10
International Woodworkers of America v. *National Labor Relations Board*, 263 F.2d 483 (C.A.D.C.)	15
J. I. Case Co. v. *National Labor Relations Board*, 253 F.2d 149 (CA 7)	18
National Labor Relations Board v. *Acme Industrial Co.*, No. 52 (October Term, 1965)	19
National Labor Relations Board v. *Celotex Corporation*, F.2d (CA 5, June 28, 1966), 62 LRRM 2475	12
National Labor Relations Board v. *Express Publishing Co.*, 312 U.S. 426	12

Page

National Labor Relations Board v. *J. H. Allison and Co.*, 165 F.2d 766 (CA 6) 18
National Labor Relations Board v. *Leland Gifford Co.*, 200 F.2d 620 (CA 1) 18
National Labor Relations Board v. *The Item Company*, 220 F.2d 956 (CA 5) 18
National Labor Relations Board v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956) 12, 13, 14, 15, 18, 19
National Labor Relations Board v. *Whitin Machine Works*, 217 F.2d 593 (CA 4) 18
National Labor Relations Board v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958) 13
National Labor Relations Board v. *Yawman and Erbe Mfg. Co.*, 187 F.2d 947 (CA 2) 17
Phelps Dodge, 101 NLRB 360 18
Sylvania Electric Products Inc. v. *National Labor Relations Board*, 291 F.2d 128 (CA 1, 1961), certiorari denied, 368 U.S. 926 ..... 3, 7, 10, 16, 19, 20, 21, 22
Taylor Forge and Pipe Works v. *National Labor Relations Board*, 234 F.2d 227 (CA 7) 18
United Fire Proof Warehouse Co. v. *National Labor Relations Board*, 356 F.2d 494 (CA 7) 15, 19

STATUTES:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.):
Section 8(a)(1) 10
Section 8(a)(5) 3, 10, 20
Section 8(d) 3
Welfare and Pension Disclosure Act of 1959, 72 Stat. 997, 29 U.S.C. § 301 ..... 12, 21

MISCELLANEOUS:

Basic Patterns in Union Contracts, The Bureau of National Affairs, p. 44:6 (January 1966) 21
Labor Mobility and Private Pension Plans, U.S. Dept. of Labor Bulletin No. 1407, p. 56 (June 1964) .. 20

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Sylvania Electric Products Inc. petitions for a writ of certiorari to review the judgment and decree of the United States Court of Appeals for the First Circuit issued on April 5, 1966, rehearing denied on April 21, 1966.

OPINIONS BELOW

The decision of the court of appeals (App. A, *infra*, pp. 1a-4a) is reported at 358 F. 2d 591 and at 61 LRRM 2657. The decision and order of the National

Labor Relations Board (J.A. 51-68),[1] 154 NLRB No. 149, is not yet officially reported.

JURISDICTION

The judgment and decree of the court of appeals were entered on April 5, 1966. A petition for rehearing was timely filed on April 18, 1966 and denied on April 21, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Is an employer guilty of a refusal to bargain under the National Labor Relations Act where he refuses to furnish to the union representing his employees information concerning matters outside the scope of "wages, hours, and other terms and conditions of employment"—in this case the estimated costs of increases proposed by the employer in the group insurance and pension program which he wholly finances—when the employer himself at no time during bargaining negotiations puts such collateral matters in issue.

2. Is an employer engaged in renegotiating with a union a collective bargaining agreement containing provisions for group insurance and pensions wholly financed by such employer, guilty of a refusal to bargain under the National Labor Relations Act if he offers to improve at his own expense the level of bene-

[1] The reference to "J.A." is to the Consolidated Joint Record Appendix in Case Nos. 6623 and 6646 in the court of appeals. Review is sought only with respect to Case No. 6623, however. Numbers preceding a semicolon refer to those portions of the stenographic transcript of proceedings that are printed in the Appendix; those following a semicolon refer to the trial examiner's decision, which was adopted *in toto* by the Board.

fits under such plans, without disclosing, at the request of the union representatives, the cost he will thereby incur.

STATUTE INVOLVED

The statutory provisions involved are Sections 8(a)(5) and 8(d) of the National Labor Relations Act (herein called the "Act"). They are printed in Appendix B hereto, *infra,* pp. 4a-6a.

STATEMENT OF THE CASE

A. Nature of the Proceeding

This case involves an order of the National Labor Relations Board (herein called the "Board"), enforced by the court of appeals, requiring petitioner to cease and desist from refusing to bargain collectively with Local 352, International Union of Electrical, Radio and Machine Workers, AFL-CIO (herein called the "Union") and to furnish upon request the costs or estimated costs of recently negotiated improvements in the existing pension and group insurance programs.

B. The Earlier Sylvania Case

To put both the facts relating to bargaining negotiations and the opinion of the court below in perspective, reference to an earlier decision regarding the same employer, rendered by the same court of appeals in 1961, appears to be in order at this point. In *Sylvania Electric Products Inc.* v. *NLRB,* 291 F. 2d 128 (C.A. 1, 1961) cert. denied 368 U.S. 926, the same court of appeals set aside an order of the Board which imposed the duty upon Sylvania during the course of

its bargaining negotiations at one of its other plants, to disclose to the Union the current and past costs of a group insurance plan that the company wholly financed. The court there held that employer contributions to a plan wholly paid for by the employer were not "wages" under the Act and consequently there was no obligation to furnish information regarding them. Inasmuch as the company did not resist any demands by the union on the ground that costs would be excessive, and at all times bargained on the basis of the level of benefits to the employees, the court found no duty on the part of Sylvania to provide cost data to the union to support its position.

C. Statement of Facts

This case arose in a Sylvania plant at Batavia, New York, covered by collective bargaining contracts with the charging union for more than a decade (J.A. 6; 54). The contract at this plant, prior to the controversy giving rise to this case, had included a pension plan administered at one of the divisional headquarters of the Company at Salem, Massachusetts (J.A. 109), and a comprehensive accident, sickness, disability and life insurance plan (J.A. 97)—both of a non-contributory character.

The 1962 agreement was to expire September 30, 1964 (J.A. 16; 54). On March 30[2] the Union expressed to the Company its interest in an early beginning to negotiations (see J.A. 176), and followed this by a request in a letter dated June 11, for certain cost information involving past and current plans which it stated was "necessary for intelligent bargaining"

[2] All dates refer to 1964 unless otherwise specified.

(J.A. 85). The information requested was the following (J.A. 85):

> "1) for the pension program copies of the actuary's valuation, the Trustee's report and the D-2 report for the last two years as well as age, sex, and seniority distribution in five year groups, i.e., under 25, 25-29, 30-34, etc. to a group age 65 and over.
>
> "2) for the insurance program as a whole and each aspect such as life insurance, weekly sickness and accident, hospitalization, surgery, major medical for each of the last two years broken down by active employees, dependents and retirees:
>
> a. premiums paid by the company
>
> b. claims paid
>
> c. dividends (refund of excess deposits)
>
> d. reserves at the beginning of the year
>
> e. additions to reserves during the year
>
> f. interest on reserves received during the year
>
> g. retention and administrative expense
>
> h. commissions paid
>
> "3) for the savings and security plan the amounts of company and employee contributions, the Trustee's report, the plan portfolio and D-2 reports of each of the last two years."

In response to this request, the Company on July 21 furnished a substantial amount of information, including documents showing costs, on its pension plan and group insurance plan (J.A. 86-153; 55).[3] The pension plan information, covering the years 1962 and 1963, showed the payments made by the Company

[3] The savings and security plan is not involved in this case.

(J.A. 101-115), the actuarial assumptions used (J.A. 111), the Trustee's Report (J.A. 119-122), and the age, sex and seniority breakdown for the bargaining unit employees (J.A. 117). The group insurance information showed among other things claims and premium expenses for the years 1962 and 1963 (J.A. 89-100, 118). The Union never questioned the sufficiency of this information (J.A. 23-24).

At no time, however, did the Union negotiating committee examine this information (J.A. 23). The principal union negotiator, Peter Scibetta, merely forwarded the documents to Earl Kipp, assistant director of the international union's pension and insurance department in Washington, D. C. (J.A. 24). Neither the negotiating committee nor Kipp ever questioned the adequacy of the information (J.A. 23-24)

Bargaining commenced on July 24, continued on fifteen separate days, and culminated in the execution of a new contract on October 1 (J.A. 7, 16, 36; 56, 60). Nevertheless, the union which agreed to the contract, insisted upon pressing the charge it had filed one week previously with the Board. The contract in effect during negotiations contained a pension plan and an insurance plan both of which were fully paid for by the Company; no contributions thereto were made by employees (J.A. 7, 39; 59-60). The proposals of both the Union and Company for improvements in these plans, and the improvements finally agreed upon, were based upon the understanding that the Company would bear the entire cost (J.A. 7, 39; 54).

The Union first proposed improvements in the pension and insurance plans at the opening bargaining session on July 24 (J.A. 8; 56). The Company offered

improvements in the two plans on August 10 (J.A. 24; 56). It was not until September 23—over a month after the Company had submitted its proposals and a week before the contract was signed—that the Union made a specific request for a cents per hour breakdown of the estimated cost of the Company's proposal (J.A. 32, 39; 58, 64).[4] The chief Company negotiator, Joseph Gill, denied this request, pointed out to the Union that the Company was bargaining on the level of benefits to the employees and not on the cost to the Company (J.A. 32, 39; 58) and reminded the Union that the benefits were non-contributory on the part of the employees (J.A. 39).

The Union reiterated its oral request of September 23 by letter on that date (J.A. 173). In a letter dated September 25 the Company noted that the Union's request was directed to non-contributory improvements in pensions, insurance and vacations,[5] and that such benefits were provided by the Company without diminution regardless of any increase in costs during the term of the agreement (J.A. 174; 59-60). The Union repeated its request for the information on September 28 (J.A. 16), and once again was turned down (J.A. 16).

The Company's chief negotiator, Gill, knew of the court of appeals' decision in the 1961 *Sylvania* case and prior to negotiations had discussed with the Company's manager of labor relations the matter of furnishing the Union with cost information if the Union

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[4] There was conflicting testimony as to whether any request for a cost breakdown was made earlier (see *infra*, pp. 8-9).

[5] Scibetta's testimony suggests that the Union's request was narrower than that, in that the information it sought was limited to the insurance and pension program (J.A. 17).

should request it (J.A. 36-37). At the outset of negotiations Gill told the Union that the Company would not profess inability to pay the cost of any of the items to be negotiated (J.A. 38). Throughout the course of negotiations the Company never quoted any cost to the Union with respect to its proposal as a whole, or with respect to the pension or insurance components (J.A. 38). Gill did point out that the Company considered cost in the formulation of its proposals (J.A. 39). The Company adhered to the position that it was bargaining on the level of benefits to the employees, not the cost to the Company (J.A. 41), and that it was not obligated to furnish the requested cost information to the Union.

Any importance to the cost issue was not readily apparent in negotiations. Although it was Scibetta's testimony that the Union first asked Gill on August 12 "if he would break down the economic offer they were making with respect to all things that were contained in it" (J.A. 11)—an assertion flatly denied by Gill (J.A. 36-37)— he acknowledged that the Union committee's notes of that day's negotiations did not specify any such request to the Company (J.A. 26). Moreover, Scibetta at no time during negotiations asked the Union's pension experts in Washington to evaluate the pension or the insurance improvements proposed by the Company in terms of cost (J.A. 21, 24). Nor was there any discussion of costs at the meeting of September 8, even though on that day Earl Kipp, the international union's pension expert, took an active part in bargaining (J.A. 12-13).

Scibetta testified that he made another request for a cost breakdown on September 17—this too was denied by Gill (J.A. 36-37)—but at most his reference to

cost was directed to a proposed change in the job evaluation system. This request, if it was raised at all, was quickly dropped when negotiations turned to other matters (J.A. 26). The only written request for cost information, apart from the July request pursuant to which the Company furnished a number of documents, was the Union's letter of September 23.

Scibetta, who had participated in negotiations with the Company covering its Buffalo plant about 40 miles away[6]—where the Company had made the same offer—was aware of no request by the Union in those negotiations for cost information (J.A. 20, 28). On September 23 the Union indicated to the Company for the first time that it was interested in comparing the cost of the package at Buffalo to the proposals at Batavia (J.A. 33) and might wish to divert the proposed increases to other benefits (J.A. 33-34). However, the Union committee never asked its pension department what information it might need to estimate the cost of the proposals, and Scibetta admitted that he had no intention of making an estimate himself (J.A. 30).[7] Scibetta nevertheless did venture the opinion to the Company that there was a differential of 5 or 6 cents between the Batavia and Buffalo offers (J.A. 20, 29, 41).

The only written estimate available to the Company regarding pension and insurance improvement costs was a document prepared on a company-wide but not a plant-wide basis (J.A. 40, 43). The benefits under the

[6] The Buffalo contract was executed on August 31, 1964, a month prior to the settlement at Batavia (J.A. 40).

[7] Nor did he indicate to the Company that he did not have enough information to make an estimate of the cost of the Company's offer (J.A. 29).

pension and group insurance plans were, with a few exceptions, the same throughout the approximately 38 plants of the Company (J.A. 39, 40).

D. The Decision of the Trial Examiner and Board

The complaint issued by the General Counsel alleged that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union "data related to the cost of insurance and pension programs" proposed by the Company (J.A. 83). The Company admitted that it had refused to furnish such information (J.A. 61), but denied the commission of any unfair labor practice.

A hearing was held before a trial examiner of the Board, who issued his decision on July 9, 1965 (J.A. 52-67). At the outset of the hearing Board counsel was invited by the examiner to state his theory of the case. His opening remarks made clear that he was not relying upon any premise that the instant case was distinguishable from the earlier *Sylvania* case, but rather upon the ground that the Board had in a subsequent opinion—*Electric Furnace Co.*, 137 NLRB 1077, 1080—announced its disagreement with the First Circuit's decision. The trial examiner held that the Company violated the Act. He adhered to the Board's rationale in the earlier *Sylvania* case that premium costs of both a contributory and non-contributory insurance program constitute "wages" under the Act and hence must be supplied upon request.

He also concluded, however, that the earlier *Sylvania* case was distinguishable on the ground that "the record shows that in the instant case Respondent itself made costs a relevant bargaining issue" (J.A. 62). As support for that hypothesis he relied upon the

fact that the Company spokesman, Gill, had pointed out that the Union's proposals would be costly (J.A. 62-63). Having thus arrived at a statutory duty to furnish cost information, he refused to draw any distinction between actual costs and estimates of costs, and also rejected the Company's contention that the Union failed to show any necessity for the requested information (J.A. 13). As to the latter he declared that necessity is conclusively presumed if the information sought is found to be relevant (J.A. 63-64).

The trial examiner hedged with respect to the purported Union requests of August 12 and September 17. He expressly did not decide whether a specific cost breakdown in cents per hour had been made prior to September 23 (J.A. 59), but instead ambiguously found that a cost breakdown had been requested in "general terms" prior to that time (J.A. 57, 58). He concluded that the Company had violated the Act by failing to furnish the cost information "at least on and after September 23" (J.A. 64).

The Board simply adopted, without independent opinion of its own, the findings, comments and recommended order of the trial examiner (J.A. 51-52).

E. The Decision of the Court Below

A wholly different approach was taken by the court of appeals, which rejected both theories of the trial examiner. The court explicitly adhered to its earlier view that premium costs of an employer's non-contributory welfare and pension program are not mandatory subjects for bargaining. It quoted its earlier statement that

> "to define an employer's contribution to a non-contributory welfare program as 'wages' to the

> employees . . . would expand the concept of wages so far as to break down if not destroy, the distinction in the Act between 'wages, hours, and other terms and conditions of employment' as to which there is a mutual mandatory duty to bargain collectively, and those matters as to which each party is free to bargain or not to bargain, and to agree or not to agree . . ."

The court also refused to accept the notion that petitioner had interjected costs as a defense to paying for increased benefits, and had thereby become obligated to furnish supporting information under the doctrine of *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149.[8]

Nonetheless it found a violation.[9] It noted the Board's argument "that a party who withholds information that would significantly aid the bargaining process, only for the sake of keeping the other in the dark" is not bargaining in good faith. Applying this maxim to the case before it, it stated its holding—and

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[8] The court also rejected the contention, pressed by the union, that the enactment of the Welfare and Pension Disclosure Act of 1959, 72 Stat. 997, 29 U.S.C. § 301, had broadened an employer's duty to disclose under the National Labor Relations Act. The court found the Disclosure Act to be irrelevant to the delineation of rights under the NLRA.

[9] Notwithstanding the narrow violation found—the refusal to disclose cost information was the only asserted incident of lack of good faith—the order enforced by the court of appeals was not limited to the disclosure of such information, but broadly restrained Sylvania from interfering "in any like or related manner" with the union's bargaining efforts. This shotgun order of the Board, which would restrain activity unrelated to the particular conduct which the Board found offensive, should not be permitted to stand. *NLRB* v. *Express Publishing Co.*, 312 U.S. 426. *NLRB* v. *Celotex Corporation*, —— F. 2d —— (CA 5, June 28, 1966), 62 LRRM 2475.

its ground for distinguishing its earlier decision—as follows:

> "However, when the Union makes the same demand [for premium costs] in order better to evaluate the desirability of an increase in welfare benefits as against an equivalent increase in take-home pay, matters as to which the employer must bargain, the Board might properly conclude that the information, though collateral, was so necessary to effective negotiation that withholding it without good reason was inconsistent with the duty to 'exert every reasonable effort to make and maintain agreements', *NLRB* v. *Truitt Mfg Co. supra* at 152."

REASONS FOR GRANTING THE WRIT

1. The decision of the court below, which forges a novel and unsupportable standard in defining an employer's statutory duty to disclose information, will have important — and invidious — ramifications throughout the entire collective bargaining process. Ten years after this Court's decision in *Truitt*[10] and eight years after *Borg-Warner*,[11] the court of appeals seems to have seized upon *Truitt* to erase the essential distinction drawn in *Borg-Warner* between mandatory subjects such as wages, about which the parties must bargain, and non-mandatory subjects with respect to which the parties may at their own choosing bargain or not bargain.

Here, although the court of appeals correctly found that the union's request for information related to a subject outside the scope of "wages, hours, and other

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[10] *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149 (1956).

[11] *NLRB* v. *Wooster Division of Borg-Warner Corporation*, 356 U.S. 342 (1958).

terms and conditions of employment" and hence presumably outside the realm of any mandatory bargaining duty, it nonetheless found that because the information sought would have significantly aided the bargaining process, a statutory obligation to disclose such "collateral" information—costs—had arisen. Citing this Court's decision in *Truitt,* the court held that where collateral information was necessary to "effective negotiation," withholding it solely on the ground that there was no statutory duty to disclose it was inconsistent with good faith bargaining and thereby unlawful.

This, we submit, ascribes a breadth to the *Truitt* opinion which was neither intended by its authors nor reflected by its text. This Court held in that case that an employer had refused to bargain in good faith by refusing to supply the union with information in support of its assertion that it was financially unable to meet the union's demand for a wage increase. The Court noted, 351 U.S. at 152:

> "In their effort to reach an agreement here both the union and the company treated the company's ability to pay increased wages as highly relevant . . .
>
> "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim."

The fault of the employer in *Truitt* was that he evidenced bad faith by cutting off any meaningful discussion on a matter that both parties treated as a vital issue. By adamantly maintaining that he could not meet the union's demands, but refusing to document his position, the employer unilaterally removed the question of wages from the negotiation.

In the case at bar, however, the court—although recognizing that the company was not pleading inability to pay and was bargaining solely on the basis of benefits to the employees—relied on *Truitt* as support for the premise that an employer must disclose whatever information might facilitate negotiations, i.e., might be useful to the union. There are of course innumerable items that could be useful to union negotiators. It would be decidedly to a union's advantage, for example, to know that a corporation's board of directors had authorized its negotiators to make concessions up to a certain limit, if necessary to avert a strike. Knowledge that an employer was engaged in performance of a substantial number of cost-plus contracts with the Government, so that even a steep wage increase would not come from the company's pocket but would be passed on to the Government as a cost of the contract, would undoubtedly strengthen the union's hand. Yet these matters are clearly outside the realm of mandatory bargaining, *International Woodworkers of America* v. *NLRB*, 263 F. 2d 483, 485 (C.A.D.C.).

Moreover, in extending the bargaining duty to matters which merely facilitate negotiation, irrespective of their non-mandatory character, the First Circuit has adopted a rationale at odds with that recently announced by the Seventh Circuit in *United Fire Proof*

Warehouse Co. v. NLRB, 356 F. 2d 494. There the Board had held that the employers violated the Act by claiming in negotiations that they were unable to do anything but reduce wages, while refusing to furnish certain financial records to the union in support of their claim. The employers had contended that no matter what their overall financial records revealed, they in any event wanted to make the local aspect of their moving operations profitable through a wage decrease applicable to all their operations.

The court denied enforcement of the Board's order. It put in proper perspective, we think, the duty of the employer to disclose, stating, 356 F. 2d at 498:

> "But the testimony does not indicate that they [the employers] contended they could not meet the wage increase requested, but rather that they simply would not meet it. Where the evidence disclosed 'won't', the Board found 'can't'.
>
> If the employers claimed that they were unable to pay, the union had a right to be shown evidence of inability. But when the employers refused to pay, the union knew all it was entitled to know. In such a situation, further financial information from the employers' records would be interesting and perhaps useful to the union, but not required; for such information cannot convert stubborn resolution into an excuse for failure to grant a wage increase or provide the basis for mutual bargaining concessions occasioned by a common understanding of financial plight."

The court of appeals' current *Sylvania* decision loses sight of the nature of the disclosure obligations for it confuses a bargaining relationship with a fiduciary one. Fiduciary status, with its attendant obligations of disclosure and accounting, is not properly a part of

the arms-length relationship which the very term "bargain" indicates should exist between an employer and a union. Inasmuch as the employer and the union are adversaries at the bargaining table, there is clearly no fiduciary relation between the two which would support any broad obligation of disclosure. Hence, to the extent that the courts have imposed such a duty upon the employer, it has been limited to situations where the information sought is necessary to the function of the bargaining representative if collective bargaining is to supplant individual bargaining.

The decision of the court below represents a departure from this standard borne out through judicial decisions not only in other circuits, but its own as well. Thus the cases holding that the collective representative has a right to know the wages of each individual in the bargaining unit, e.g., *Boston Herald-Traveler Corp.*, 223 F. 2d 58 (CA 1, 1955),[12] are not really disclosure cases at all, for each employee in the bargaining unit already knows what his rate of pay is. But since the law makes the majority representative the exclusive representative of all the employees in the unit, irrespective of their wishes, it follows that such representative is entitled to the sum of all the wage information in the possession of each individual employee in order to bargain for the group on this subject.

Accordingly it has been held that the requested information must be divulged where the union asked for lists of employees, their classifications and their current and prior salaries, *NLRB* v. *Yawman and Erbe Mfg. Co.*, 187 F. 2d 947 (CA 2); individual wage rates,

[12] This was cited by the court below in support of its decision.

NLRB v. *Whitin Machine Works*, 217 F. 2d 593 (CA 4) and *NLRB* v. *Leland Gifford Co.*, 200 F. 2d 620 (CA 1); lists of employees receiving merit increases, *NLRB* v. *J. H. Allison and Co.*, 165 F. 2d 766 (CA 6); lists of employees, salaries, length of service and merit increases, *NLRB* v. *The Item Company*, 220 F. 2d 956 (CA 5).

By the same token where the negotiated wage rates depend upon the operation of a piece-work system or job evaluation plan, the employee bargaining representative is entitled to know the methods of calculation so as to be able to ascertain the criteria for classification of wage payments and to determine whether the contract wage rates have actually been complied with. Decisions holding that employers have to provide such information, *Taylor Forge and Pipe Works* v. *NLRB*, 234 F. 2d 227 (CA 7) (point scores on job evaluation), and *J. I. Case Co.* v. *NLRB*, 253 F. 2d 149 (CA 7) (time studies), also do not assume any fiduciary status on the part of employers, for under the law of sales similar accounting may be obtained by purchasers from sellers where the right to payment depends upon deliveries of a certain quantity or quality. The disclosure in *NLRB* v. *Truitt Mfg. Co.* could likewise be compelled by a purchaser, for while a vendor in his negotiations may remain silent as to certain features of his product, he is not entitled to misrepresent them to the prospective purchaser.[13]

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[13] The fiduciary obligation of full and candid disclosure would arise in cases where the collective bargaining agreement establishes a limited trust arrangement. An example is a contributory group insurance plan, where the employer collecting the employees' share of the proceeds owes them a duty of accounting. *Phelps Dodge*, 101 NLRB 360.

The latter situation, according to the court of appeals, did not obtain here, for the court recognized that the company did not represent that it was unable to meet the costs of any plan. Since under these circumstances no danger of misrepresentation could possibly occur, the company under applicable principles of law was under no duty to document its position. See *United Fire Proof Warehouse Co.* v. *NLRB, supra.*

The new ground broken by the lower court's decision—that "collateral" information to mandatory subjects of bargaining must be furnished even though the employer's bargaining approach does not put them in issue—calls for clarification by this Court of the duty to disclose. Plainly under this rule a union's unilateral announcement that the information sought is "relevant" to its formulation of economic demands could compel an employer to disclose virtually every item of the cost of its operations to a group to which it owes no fiduciary duty. (Indeed, clarification of the extent of the employer's duty to disclose was sought by the Solicitor General five years ago with respect to the earlier *Sylvania* case (No. 417, October Term, 1961)). In view of the blurring of the established distinction between mandatory and non-mandatory subjects for bargaining, and the broad reading now given to the *Truitt* corollary, collective bargaining negotiations can be expected to founder as the parties jockey to assert their increasingly hazy legal rights in this area.[14]

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[14] It should be noted that this Court has recently granted certiorari in *NLRB* v. *Acme Industrial Co.*, No. 52, a case involving the refusal to furnish information to a union processing grievances under the grievance procedure of an existing contract.

2. In addition to the importance of the need to delineate the duty to furnish information during the course of bargaining negotiations in general, the decision of the court below raises issues of particular significance in the negotiation of the fringe benefits which have now become commonplace, such as the group insurance and pension programs involved here. As the Solicitor General stated in his petition (p. 6) in the earlier *Sylvania* case:

> "Clarification of the extent of the employer's statutory duty to furnish information while bargaining about a group insurance program is important, as a legal question, in the administration of Section 8(a)(5) of the National Labor Relations Act and, as a practical matter, in thousands of contract negotiations between employers and employees throughout the country."

The negotiation of welfare and pension plans has taken on major proportions in recent years. A study by the Department of Labor in 1964, analyzing plans on file with its Office of Labor-Management and Welfare-Pension Reports,[15] showed that almost eleven million employees were covered under collectively bargained pension agreements alone. Approximately nine million employees were subject to pension programs wholly financed by the employer. A Bureau of National Affairs study published this year of a broad grouping of selected collectively bargained plans containing some sort of social insurance revealed that ap-

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[15] *Labor Mobility and Private Pension Plans*, U.S. Dept. of Labor Bulletin No. 1407, p. 56, Table II (June, 1964).

proximately two-thirds of the plans were non-contributory.[16]

Plainly increased coverage under such plans has become a major union goal, and a focal point of collective bargaining. Additional complexities to the obligation of disclosure have been added by the enactment of the Welfare and Pension Disclosure Act of 1959, for compliance with its broad reporting requirements may conceivably wholly satisfy an employer's duty to disclose with respect to plans covered by the Disclosure Act provisions.

3. Finally, this Court should intervene to resolve the confusion where a circuit court, here the First Circuit, has permitted two conflicting decisions to stand as the law of the circuit. The three judge panel, consisting of two judges who did not sit in the earlier *Sylvania* case, explicitly and correctly affirmed the court's earlier view that costs to an employer of a non-contributory plan did not constitute "wages" within the meaning of the Act. Its ground for distinguishing the earlier case, however, was that here the Union demanded cost information "in order better to evaluate the desirability of an increase in welfare benefits as against the equivalent increase in take-home pay." Under these circumstances, the court asserted, the obligation to disclose collateral information came into play.

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[16] *Basic Patterns in Union Contracts*, The Bureau of National Affairs, p. 44:6 (January 1966). Moreover, at the close of last year there were 128,600 active welfare plans and 34,110 pension plans, not necessarily collectively bargained, on file with the Department of Labor. Thirty-six per cent of the welfare plans, and seventy-two per cent of the pension plans, were wholly financed by employers. 61 LRR 227 (April 18, 1966).

But precisely this contention was put to the court of appeals in the earlier *Sylvania* case,[17] and the court there rejected the very premise that it now adopts. The court in its concluding paragraph, 291 F. 2d at 132, pointed out:

> "Here, however, no issue of cost arose, for Sylvania at no point in its negotiations with the Union interposed cost as a factor bearing on its willingness to consider any proposal the Union might make with respect to changes in its employee insurance program. Saying that it took the cost of its insurance into account in arriving at the 'level of benefits to be offered to the employees' is not the equivalent of saying that it would not consider changes in its insurance program on account of cost. Sylvania provided the Union with all the information it required with respect to the scope and amount of the benefits of its insurance program and this is all the Union needed to formulate demands for changes in the program. *Demands for other or more extensive coverage could be formulated without reference to cost and so could demands for an increase in cash wages.* The cost of the insurance program would become an issue should Sylvania interpose that element as a ground for resisting a request for change in insurance coverage. When that occurs the time will come to decide whether Sylvania should provide cost data to support its position." (Emphasis supplied)

In view of the novel application of the doctrine of *stare decisis* by the court below, which now places both

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[17] The Solicitor General in his petition for certiorari in that case stressed that very contention (p. 9), asserting "As the Union pointed out during the negotiations, the employees in this unit might wish to change some of the types and levels of benefits, perhaps even without increasing the cost to the Company."

labor and management in a quandary as to their bargaining rights and duties under the law of the circuit, the exercise of this Court's power of supervision would appear to be called for.

CONCLUSION

For the foregoing reason, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1966

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6623

SYLVANIA ELECTRIC PRODUCTS, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, ET AL., *Respondents.*

On Petition to Review and Set Aside an Order of The National Labor Relations Board

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

Gerard D. Reilly, with whom *Lawrence T. Zimmerman, Bruce Carswell, James P. Heffernan* and *Reilly and Wells* were on brief, for petitioner.

Warren M. Davison, Attorney, with whom *Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, *Marcel Mallet-Prevost,* Assistant General Counsel, and *Allen M. Hutter,* Attorney, were on brief, for National Labor Relations Board, respondent.

Marilyn G. Rose, with whom *Irving Abramson* and *Ruth Weyand* were on brief, for Local 352, International Union of Electrical Radio and Machine Workers, AFL-CIO, intervening respondent.

Opinion of the Court

April 5, 1966.

ALDRICH, *Chief Judge.* In *Sylvania Electric Products, Inc.* v. *NLRB,* 1 Cir., 1961, 291 F.2d 128, *cert. den.* 368 U.S. 926, hereinafter *Sylvania,* we set aside an order of the National Labor Relations Board which required a bargain-

ing employer to disclose to the union the current and past costs of its noncontributory pension and insurance plans. We held that, although the benefits accruing to employees from such plans constituted "wages" that must be precisely disclosed, and as to which the employer must bargain, the cost to the employer was not. In the instant case, in the course of negotiations for a new labor contract, the employer offered the union a "package" that included improvements in existing welfare programs. Upon request the employer gave the union information relating to the cost of its current programs, but refused to furnish a breakdown of the cost of its proposed package, and hence of the welfare improvements. The union's reason for the demand was that it might prefer to retain the existing welfare plan, and opt for a higher wage rate rather than increased benefits. The employer countered that it bargained on the level of benefits, not costs, and that, in any event, it was not obligated to furnish the requested information.

The Board, adopting the trial examiner's report, held that by refusing to furnish the requested information the employer had failed to bargain in good faith, in violation of section 8(a)(5). It ordered the employer to furnish to the union "the costs or estimated costs" of the proposed improvements. In this petition to set aside the Board's order and cross-petition for enforcement, the Board, and the union, as intervenor, contend alternatively that our decision in *Sylvania, supra,* is distinguishable, and that it should be overruled.

In *Sylvania, supra,* the Board reasoned, "As the premiums paid by the Respondent constitute wages, it logically follows that the premium cost data requested by the Union relates directly to the matter of wages." We responded that "to define an employer's contribution to a non-contributory welfare program as 'wages' to the employees . . . would expand the concept of wages so far as to break down if not destroy, the distinction in the Act between 'wages,

hours, and other terms and conditions of employment,' as to which there is a mutual mandatory duty to bargain collectively, and those matters as to which 'each party is free to bargain or not to bargain, and to agree or not to agree.' " citing *NLRB* v. *Borg-Warner Corp.*, 1958, 356 U.S. 342, 349. The union now takes the same position as the Board in the earlier case, asserting, further, that *Sylvania* is inconsistent with the Welfare and Pension Disclosure Act of 1959, hereinafter Disclosure Act.[1]

We see nothing in the Disclosure Act inconsistent with our earlier view. The Act does not purport to expand the scope of "wages, hours, and other terms and conditions of employment" under the National Labor Relations Act. In fact, it does not purport to affect the course of collective bargaining relations at all. Rather, the Disclosure Act seems designed to protect the rights of employees covered by actual, not proposed, welfare programs, by compelling the employer who administers them to make disclosures of the sort owed by a fiduciary to *cestuis que trustent.*

The Board takes a narrower view. It now asserts that meaningful bargaining as to "wages, hours and other terms and conditions of employment" may require a party to disclose information on matters that do not themselves fall within that phrase. More particularly, the Board says that a party who withholds information that would significantly aid the bargaining process, only for the sake of keeping the other in the dark, may not be, and is not in this case, bargaining in good faith. We accepted that principle in *Boston Herald-Traveller Corp.* v. *NLRB*, 1 Cir., 1955, 223 F.2d 58. See also *NLRB* v. *Truitt Mfg. Co.*, 1956, 351 U.S. 149. Its application involves questions of degree, including degrees of relevance.

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[1] 72 Stat. 997, 29 U.S.C. § 301 *et seq.* Although enacted in 1959, this Act was not in effect at the time of our prior decision, and was not then called to our attention.

An employer is not required to disclose welfare plan cost information for the purpose of bargaining about whether he is receiving the best coverage for his money, because he is not obliged to discuss this matter with the union. *Sylvania, supra.* However, when the union makes the same demand in order better to evaluate the desirability of an increase in welfare benefits as against an equivalent increase in take-home pay, matters as to which the employer must bargain, the Board might properly conclude that the information, though collateral, was so necessary to effective negotiation that withholding it without good reason was inconsistent with the duty to "exert every reasonable effort to make and maintain agreements." *NLRB* v. *Truitt Mfg. Co., supra,* at 152.

The order of the Board will be enforced.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> * * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negoti-

ation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later;

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become

inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Question presented	2
Statement	2
A. The Board's findings of fact	2
B. The Board's conclusions and order	6
C. The decision of the court of appeals	6
Argument	7
Conclusion	11

CITATIONS

Cases:

Boston Herald-Traveler Corp. v. *National Labor Relations Board*, 223 F. 2d 58	7
Curtiss-Wright Corp. v. *National Labor Relations Board*, 347 F. 2d 61	9
National Labor Relations Board v. *F. W. Woolworth Co.*, 352 U.S. 938, reversing 235 F. 2d 319	7
National Labor Relations Board v. *John S. Swift Co.*, 277 F. 2d 641	7
National Labor Relations Board v. *The Item Co.*, 220 F. 2d 956, certiorari denied, 350 U.S. 836	7
National Labor Relations Board v. *Truitt Mfg. Co.*, 351 U.S. 149	7, 9
National Labor Relations Board v. *Whitin Machine Works*, 217 F. 2d 593, certiorari denied, 349 U.S. 905	7
National Labor Relations Board v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342	9
National Labor Relations Board v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947	7
Sylvania Electric Products, Inc. v. *National Labor Relations Board*, 291 F. 2d 128, certiorari denied, 368 U.S. 926	10

228-057—66

Cases—Continued

	Page
Timken Roller Bearing Co. v. *National Labor Relations Board*, 325 F. 2d 746, certiorari denied, 376 U.S. 971	7
United Fire Proof Warehouse Co. v. *National Labor Relations Board*, 356 F. 2d 494	10

Statute:

National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq*).:	
Section 8(a)(1)	7
Section 8(a)(5)	7
Section 8(d)	8

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 373

SYLVANIA ELECTRIC PRODUCTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–4a) is reported at 358 F. 2d 591. The Board's decision and order (J.A. 51–68)[1] are reported at 154 NLRB No. 149.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1966, and a petition for rehearing was denied on April 21, 1966. The petition for a writ of certiorari was filed on July 20, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "J.A." refers to the joint appendix filed in the court of appeals.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at pp. 4a–6a of the appendix to the petition.

QUESTION PRESENTED

Whether, in the circumstances of this case, the employer violated his statutory obligation to bargain in good faith by refusing, during the course of contract negotiations, to disclose to the union the estimated costs of proposed improvements in non-contributory pension and group insurance programs—data which were relevant to matters under negotiation.

STATEMENT

A. *The Board's findings of fact.* Under its collective bargaining agreement with the Union,[2] which was to expire on September 30, 1964, the Company bore the entire cost of employee group insurance and pension programs (J.A. 54; 3, 6–8). On June 11, 1964, prior to new contract negotiations, the Union requested certain cost data on the insurance and pension programs, which it stated were "necessary for intelligent bargaining" (J.A. 55; 85). In response, the Company furnished data concerning past and current programs, showing, *inter alia*, actuarial assumptions and costs of the pension plan, and claim and premium expenses of the insurance plan (J.A. 55; 86–153).

[2] Local 352, International Union of Electrical Radio and Machine Workers, AFL–CIO, which represented the production and maintenance workers at the Company's Batavia, New York plant.

On July 24, at the first bargaining session, the parties exchanged contract proposals, the Union proposing certain improvements in the pension and group insurance programs (J.A. 56; 8). At the next meeting, on August 12, the Company made a written proposal which included changes in the pension and group insurance programs (J.A. 56; 11, 155–172). Following a detailed explanation of this proposal by the Company's chief negotiator, Joseph Gill, the Union's chief negotiator asked for a cost breakdown of the Company's offer in terms of cents per hour (J.A. 56; 11–12). Conceding that the Company considered costs when bargaining about such benefits, Gill refused to provide the requested data, stating that the Company was not bargaining about its costs but only about the level of employee benefits (J.A. 56; 12). After further meetings, at which the Union presented its contract proposals, Gill commented that the Union's economic demands, if accepted, would entail substantial cost to the Company and would prevent the Company from meeting its competition (J.A. 57; 12–14). The Union negotiator replied that the Union needed information in order to bargain intelligently and that it had no desire to place the Company in a noncompetitive position (J.A. 57–58; 14–15).

When, at a meeting on September 23, a Union representative repeated the request for a cost breakdown of the Company's offer, Gill again replied that the Company was not bargaining about cost but only about the level of benefits (J.A. 58; 32). Other Union officials then stated that the Company had

attached a cost to its "package", which the Union was entitled to, and needed to, know (J.A. 58; 33). When Gill persisted in his refusal, a Union representative asked for a comparison of the value of the economic benefits offered the Company's Buffalo plant with the value of those offered in Batavia, "because if there was a difference he would like to be able to spread this over other benefits" (J.A. 58; 33–34).[3] Gill replied that he would consider it, but pointed out that there were other improvements in the "package" and that he "wouldn't like to improve the package thirty per cent" (J.A. 58; 33).[4]

The Union representative then referred specifically to the pension plan, stating that he believed that the cost attached to it was not more than half a cent (J.A. 58; 33–34). Gill, conceding that the Company had put a cost figure on the pension proposal, argued that, considering all the improvements, it was a "good package" (J.A. 58–59; 33–34). The Union's chief steward disagreed and noted his preference for the existing insurance program, which he felt was more favorable to the Batavia employees than the one being offered (J.A. 59; 34). He added that, if there were any additional costs, the Company should add

[3] The Company's Buffalo plant had an older and more senior complement of employees than the Batavia plant. Accordingly, the improved insurance and pension program appeared to provide more immediate benefits to the Buffalo employees than to the Batavia employees (J.A. 19–20, 45).

[4] The "thirty per cent" was apparently Gill's estimate of the costs the Union's demands would add to the total economic package.

them to the wage offer and forget about providing new insurance (J.A. 59; 34). Finally, the steward pointed out that the negotiators could not "sell" a contract to the Union membership when they did not understand the offer themselves. After a short recess, Gill stated that the Company's position had not changed, and the meeting adjourned (J.A. 59; 34).

Later that day, the Union's president sent Gill the following letter (J.A. 59; 173):

> Today in negotiations you repeatedly refused to give this organization requested information as to the cost in cents per hour of each item of the Company's offer for a new collective bargaining agreement.
>
> This letter is directed to you as a follow-up on the oral request made on September 23, 1964.
>
> Your cooperation in this matter is needed so we can reach a fair * * * agreement.

In reply, the Company denied the Union's request, stating (J.A. 59–60; 173–174):

> * * * With respect to your most recent request for additional cost data, which preceded your calling a recess in negotiations, such request related primarily to your desire to have the cost estimate of the Company in its proposed noncontributory improvements in such things as Pensions, Insurance and Vacations.
>
> As you know our Pension, Insurance and Vacation programs, including the proposed improvements therein, are being provided without diminishment, regardless of the fluctuation in costs thereof during the term of a new Agreement. As a result, our compliance

> with your request is not necessary in order to proceed with negotiations or to reach a fair and equitable new Agreement, and, thus, we re-affirm our position not to supply such information. Your making our compliance with the Union request a prerequisite to a continuation of negotiations is seriously impeding such a settlement.

The Union filed an unfair labor practice charge with the Board, alleging that the Company had unlawfully refused to furnish the Union "information necessary for collective bargaining purposes as to the cost of the Employer's offer as to pensions, insurance, and vacations" (J.A. 60; 79–80), and a complaint issued on this charge.[5]

B. *The Board's conclusions and order.* The Board found that the information sought by the Union regarding the cost of the Company's proposed improvements in the insurance and pension programs was relevant to the Union's bargaining function. Accordingly, it held that the Company violated Section 8(a)(5) and (1) of the Act by refusing to furnish that information and ordered the Company to provide the requested data (J.A. 65–67).

C. *The decision of the court of appeals.* The court of appeals held that, in the circumstances of this case, information about the cost of the Company's proposed improvements in the pension and insurance plans was "so necessary to effective negotiations"

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[5] While the complaint was pending before the Board, the parties entered into a collective bargaining agreement based on the Company's original offer (J.A. 17–19).

that the Company's refusal to produce it was inconsistent with its bargaining obligation (Pet. App. 4a). The court thus sustained the Board's findings and enforced its order (*ibid.*).

ARGUMENT

The decision of the court of appeals, which turns on the particular facts of this case, is correct and is not in conflict with the decision of any other circuit. There is no occasion for further review.

1. This Court has recognized that an employer violates Section 8(a)(5) and (1) of the Act if he refuses, during the course of contract negotiations, to furnish the employees' bargaining representative with wage and related information reasonably necessary to enable it to perform its representative function intelligently. *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149; *National Labor Relations Board* v. *F. W. Woolworth Co.*, 352 U.S. 938, reversing 235 F. 2d 319 (C.A. 9).[6] The Board and the court of appeals correctly applied this principle in the present case. Under the circumstances revealed in the present record, the Board and the

[6] Accord: *Boston Herald-Traveler Corp.* v. *National Labor Relations Board*, 223 F. 2d 58, 60–61 (C.A. 1); *National Labor Relations Board* v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947, 949 (C.A. 2); *National Labor Relations Board* v. *Whitin Machine Works*, 217 F. 2d 593 (C.A. 4), certiorari denied, 349 U.S. 905; *National Labor Relations Board* v. *The Item Co.*, 220 F. 2d 956, 958 (C.A. 5), certiorari denied, 350 U.S. 836; *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 325 F. 2d 746, 751 (C.A. 6), certiorari denied, 376 U.S. 971; *National Labor Relations Board* v. *John S. Swift Co.*, 277 F. 2d 641, 645 (C.A. 7).

court properly concluded that the lack of information respecting the cost of the Company's proposed improvements in the insurance and pension plans significantly impaired the Union's ability to engage in meaningful bargaining about "wages, hours, and other terms and conditions of employment" (Section 8(d)).

When the Company offered the Union a package that included improvements in the existing welfare programs, the Union requested a cost breakdown. Although the Company acknowledged that it took cost into consideration in making its offer and opposed the Union's suggested changes on the ground that they would be too costly and would render the Company noncompetitive, the Company refused the Union's requests for information on the sole ground that it was bargaining about benefits and not costs. As a result, the Union had to guess about the money value which the Company attached to the welfare improvements—the guesses ranging from half-a-cent to thirty cents an hour (J.A. 20–21, 33–34). Moreover, the Union was prevented from effectively exploring the possibility of exchanging the cost of the proposed welfare benefits for increased wages or other benefits which the Union considered more desirable for the Batavia employees. In these circumstances, the Board was warranted in concluding that the information requested by the Union "was so necessary to effective negotiation that withholding it without good reason was inconsistent with the duty to 'exert every reasonable effort to make and main-

tain agreements'" (Pet. App. 4a, quoting from *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152).

2. There is no substance to petitioner's contention (Pet. 13–19) that the decision of the court below obliterates the distinction between mandatory and non-mandatory subjects of bargaining. See *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342. Assuming *arguendo* that a non-contributory employee insurance and pension program is in the latter category, *Borg-Warner* requires only that, if the Union proposed such a program, it could not compel the Company to bargain about it. Nothing in that decision suggests that, where the employer himself makes a proposal which encompasses a non-mandatory bargaining subject and the union undertakes to negotiate about it, the union is precluded from obtaining information on the cost of the non-mandatory component of the proposal, where, as here, there is a close relation between the latter and the remaining components, which are clearly within the area of mandatory bargaining. See *Curtiss-Wright Corp.* v. *National Labor Relations Board*, 347 F. 2d 61, 70–71 (C.A. 3), where the union was held entitled to information respecting the duties and functions of employees outside the bargaining unit because such information was relevant to a determination whether the unit had been improperly diluted.

This point explains and justifies the difference in result between the decision below and the decision

of the same court in *Sylvania Electric Products, Inc.* v. *National Labor Relations Board*, 291 F. 2d 128 (C.A. 1), certiorari denied, 368 U.S. 926, involving another plant of the same employer. In that case, the court held that the union was not entitled to information regarding the costs of a non-contributory group insurance plan. But, as the court explained here, the union there simply requested "welfare plan cost information for the purpose of bargaining about whether [the employer] is receiving the best coverage for his money," a matter which the employer is not obliged to discuss with the union (Pet. App. 4a). Unlike the present situation, the union there did not show that the information was needed "in order better to evaluate the desirability of an increase in welfare benefits as against an equivalent increase in take-home pay, matters as to which the employer must bargain * * *" (Pet. App. 4a).[7]

[7] *United Fire Proof Warehouse Co.* v. *National Labor Relations Board*, 356 F. 2d 494 (C.A. 7) (Pet. 15–16), is also distinguishable. There, the employer rejected a union demand for a wage increase on the ground that a portion of his operation was losing money. When the union insisted upon substantiation of this claim, the employer furnished information relating to the portion of the business that was losing money, but declined to permit the union to inspect financial records regarding his entire operation. The court held that, as the employer had never contended that his entire operation was losing money but that only a portion was unprofitable, there was no basis for concluding that financial data relating to the entire operation was relevant to the bargaining negotiations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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and

LOCAL 352, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

and

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

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SYLVANIA ELECTRIC PRODUCTS, INC.

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Chamber of Commerce of the United States moves this honorable court for leave to file the attached brief as amicus curiae in the above entitled case.

Consent to this filing has been given by the Solicitor General in behalf of the National Labor Relations Board, the principal respondent and by counsel for Sylvania Electric Products, Inc., petitioner. Local 352, International Union of Electrical Workers, AFL-CIO, which was permitted to intervene in the Court of Appeals for the First Circuit has not consented.

The nature of the movant's interest, and its reasons for believing that the case presents issues of such nationwide interest that the court should grant a writ of certiorari are contained in the brief.

Respectfully submitted,

CHAMBER OF COMMERCE OF THE UNITED STATES
by its attorney,

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and

LOCAL 352, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

INTRODUCTION

The Chamber of Commerce of the United States submits this brief as *amicus curiae* in support of the granting of the petition. This brief is filed with the consent of the Solicitor General.

The Chamber of Commerce of the United States (herein referred to as the Chamber) is an organization comprised of over 3,750 local, state and regional chambers of commerce and trade and professional associations. These groups and assoications, in turn have an underlying membership of approximately 4,500,000. In addition, the Chamber has a direct membership in excess of 32,000 corporations, firms and individuals.

STATEMENT OF POSITION

In the Chamber's view, there are two particularly ominous aspects of the court of appeals' decision, which will have significant and disruptive repercussions in the area of collective bargaining. The first is the erosion of the distinction drawn in *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, between mandatory subjects, about which the parties are obligated to bargain, and permissible subjects, about which the parties may or may not bargain as they see fit. The court of appeals has adopted instead the vague and unworkable standard that information pertaining to subject matter outside of the mandatory areas of "wages, hours, and other terms and conditions of employment" must nonetheless be disclosed if "necessary to effective agreement." Although we do not doubt that disclosure of innumerable types of information in the hands of either party might facilitate agreement—it would be helpful to an employer, for example, to know the size of a union's strike fund—it had heretofore been recognized that disclosure was compelled only with respect to the mandatory subject matter specified in Section 8(d) of the Act, or, under *N.L.R.B.* v. *Truitt Manufacturing Co.*, 351 U.S. 149, where a party was called upon to document a bargain-

ing claim. As it now stands in the light of the most recent *Sylvania* decision, wholly collateral matters may be converted to mandatory bargaining items if their discussion would facilitate the reaching of a collective bargaining agreement.

The second aspect that we find disturbing, a corollary of the first, is the broad obligation imposed by the court upon employers to divulge their costs to unions during the course of collective bargaining negotiations. *Truitt* decreed that an employer must furnish information regarding his financial position if he resists a wage demand of a union on the ground that his financial position is too bleak to meet it. The requirement of good faith bargaining, this Court said, necessitated that a party asserting a defense be willing to document it. The court of appeals in effect stands *Truitt* on its head, invoking an obligation on the part of an employer to disclose aspects of his financial position when it is the union—not the employer—which is broaching the claim. Hence the basic proposition underlying *Truitt* has been ignored.

If a union is entitled to cost information solely on the ground that with the information in its possession it may frame alternative wage demands—as is the case here—plainly no cost information is immune from union scrutiny. The practical effect of such an approach is to force an employer to open his books and records to a union whenever he happens to resist a wage demand, even though he does not resist on the ground of inability to pay.

REASONS FOR GRANTING THE WRIT

The court of appeals has, we believe, so blurred any distinction between mandatory and permissible subjects for bargaining as to impose upon a party to negotiations the obligation to confer—and hence, where necessary, to document its position—on any subject that might facilitate the reaching of an agreement. It had ruled out any contention that Sylvania had claimed that it was unable to pay the union's demands, and had reaffirmed its earlier finding that the costs in issue here were not wages and hence in themselves were not a mandatory subject of bargaining under the Act. The obligation to furnish cost information arose, we understand the court to say, solely because of the union's assertion that it might have elected to make an alternative proposal—for an hourly increase rather than a fringe benefit improvement—if it had possessed the information it sought.

Moreover, in no way was the information truly "necessary to effective agreement." Since the company had not claimed inability to pay, the union was free to present—for the company to consider on their merits—whatever alternative demands it wished. Hence bargaining was in no sense frustrated by the company's refusal to furnish the information. What the court really seems to be saying is that such information may have been a useful tool to the union in the conduct of its negotiations, and hence the obligation to disclose came into being.

The adoption of such a standard by the court of appeals is in flat conflict with the holding of this Court in *Borg-Warner*. Sections 8(a)(5) and 8(d) of the Act impose the obligation to bargain in good faith with

respect to "wages, hours, and other terms and conditions of employment." As this Court stated in Borg-Warner, 356 U.S. at 349:

> "The duty is limited to those subjects, . . . As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree."

Plainly the statutory limitations upon the areas of obligatory bargaining remain paramount. Bargaining need not, of course, be confined to mandatory subjects. "Effective negotiation" may well be enhanced by a party's willingness to discuss a wide range of subjects, even though not required by law to do so. *Borg-Warner* recognizes that there is a broad range of permissible subjects for bargaining, which the parties, despite the lack of any obligation to do so, may choose to explore. But the court of appeals has improperly converted permissible collateral subjects to mandatory ones, solely on the ground that negotiations would be more effective if the parties were compelled to confer about them. However, Congress made a policy decision to the contrary by its statement of the mandatory subjects for bargaining contained in Section 8(d).

Moreover, the imposition of so loose and unworkable a standard upon negotiations would inject a chaotic element into bargaining negotiations. There are a number of things a union might like to know, or areas it might wish to explore, in the preparation of its bargaining demands. A union might be interested in discouraging certain capital expenditures of a company on the theory, unsupportable though it may be, that the money would otherwise be spent on wage increases to employees. Or a union might hold the view that a

company would be a more profitable enterprise if it were to take on an additional line of products. Presumably if the union strenuously pressed either of these demands, a company's refusal to discuss them at all would contribute to a foundering of bargaining negotations. Under the court of appeals rationale is the potential collapse of negotiations under such circumstances enough to invoke a mandatory duty to confer? Under the established tests, clearly a company's capital investment and selection of products are wholly outside any compulsory area of bargaining or disclosure.

This entire area, however, has now been rendered uncertain by the court of appeals opinion, for the union in the above hypotheticals would certainly be in a position to frame alternative wage demands if a company refrained from investing in additional plant or equipment, or did develop a new line of products—even though such action by the company would be in no way "necessary" to the formulation of such demands. With no rule other than what is "necessary to effective negotiation"—a standard which may, for all we know, turn on the sincerity with which the union holds a belief or the adamance with which it advocates a position—the parties are trapped in a bargaining quagmire which can be resolved by nothing more substantial than *ad hoc* determinations of legality by the Board and courts.

The court of appeals decision, if permitted to stand, may well have its most severe impact in the sphere of disclosure of employer costs. Notwithstanding the court's assertion that employer costs in the case at bar did not constitute "wages" within the meaning of Section 8(d) of the Act, it is apparent that under the

court's rationale—that collateral information must be disclosed where "necessary to effective negotiation" —costs nonetheless must be disclosed whenever a *union* tailors its demands so as to put the *employer's* costs in issue.

This is a far cry indeed from the proposition enunciated in *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149 (1956) that an employer may be required to disclose his costs where the *employer's* own bargaining approach makes such costs relevant. As this Court noted in *Truitt*, 351 U.S. at 152, "If such an argument [inability to pay] is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." Plainly if an employer rejects a union demand on the ground that it may drive him out of business, bargaining is frustrated if the employer remains silent about the specifics of his claim, or if in the face of a union request to prove it, he refuses to document his position. Disclosure is mandatory under such circumstances because the cost information would, in the words of the Seventh Circuit in *United Fire Proof Warehouse Co.* v. *NLRB*, 356 F. 2d 494, 498, "provide the basis for mutual bargaining concessions occasioned by a common understanding of financial plight." Thus, disclosure under such circumstances is truly "necessary to effective negotiation," for bargaining cannot really progress without it.

The First Circuit's misconstruction of the *Truitt* rationale, however, places virtually no limitations upon the mandatory disclosure of costs, and seems to revive the notion explicitly repudiated in its earlier *Sylvania* decision that any cost saving to the employer is pre-

sumptively a wage increase to the employees. Then the court said, 291 F. 2d 128, 131:

> "Furthermore, inherent in the conclusion reached by the Board, as the trial examiner pointed out, is the inarticulate premise that any cost saving to an employer is presumptively an increase in the employees' wages. While no doubt employer costs affect wages, a direct relationship between them is at the best speculative, and not in accord with current business economy or business thinking. . . ."

Indeed, by focusing in this case upon the union's assertion that it might prefer to take in the form of an hourly rate increase whatever the cost to Sylvania of its proposed improvements in its pension and welfare plan, the court of appeals *sub silentio* adopted the view that the cost of an increase in fringes was automatically translatable into an increase in hourly rates.

But the court of appeals properly recognized in 1961 and at least ostensibly recognizes now, that there is not a direct relationship between costs and wages. Reduction in an employer's costs may or may not result in a more substantial wage increase than would otherwise be granted; nor does an increase in such costs, perhaps an investment in substantial capital improvements, necessarily result in a corresponding reduction in pay for employees. Moreover, a company may well be willing to grant increases in certain fringe benefits—as hospitalization or other medical coverage—on the theory that such a benefit is needed by the employee to prevent a serious drain on the employee's finances,

and yet not be willing to grant an hourly increase of a comparable amount.[1]

Yet if the relevance of costs to the collective bargaining process turns on the union's ability to alter its demands in the light of what it believes the employer's financial condition to be, irrespective of the employer's refusal to plead inability to pay the wage demands, as the court below seems to suggest, no information is immune from union scrutiny. The court's approach here is similar to that advanced by a union to the Court of Appeals for the District of Columbia Circuit and rejected by that court in *International Woodworkers of America* v. *NLRB,* 263 F. 2d 483, 485. The union had sought information concerning annual production of each of several employers and the related dollar value of their sales. The union's request, the Board had noted,[2] was based upon its desire to determine its wage demands and its intention to use the information it obtained to rebut an expected plea of inability to pay by the employers. The Board held that the information related to the financial status of the employers, but that such information, bearing as it did upon the employers' ability to afford a proposed wage increase, need not be divulged where no such issue was raised by the employers.

The District of Columbia Circuit approved this ruling. It stated, 263 F. 2d at 485:

> "Wages and hours are the heart and core of the employer-employee relationship, and information

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[1] This in fact is what happened in the case at bar. The union did request that the cost of the proposed improvements in the insurance and pension plans be added instead to wages. Sylvania rejected that proposal (JA 34).

[2] *Pine Industrial Relations Committee,* 118 NLRB 1055.

> concerning existing and part wage rates and patterns is essential to the union to enable it to bargain intelligently. This is not necessarily so with respect to what the employer's records show about how much, or at what cost, or in what time he produces his goods, and how or at what cost or in what volume he sells those products . . ."

The First Circuit's earlier *Sylvania* decision reflected the same philosophy. It stated, 291 F. 2d at 132:

> "Saying that it took the cost of its insurance into account in arriving at the 'level of benefits to be offered to the employees' is not the equivalent of saying that it would not consider changes in is insurance program on account of cost . . . [union] demands for other or more extensive coverage could be formulated without reference to cost and so could demands for an increase in cash wages."

The court now, however, would open the financial books and records of employers to unions on the unwarranted assumption that a union cannot formulate its demands without knowledge of the employer's costs, or more broadly, his financial situation as a whole. Such information, absent an employer's claim of inability to pay the union's demands, has not heretofore been thought "necessary to effective negotiation," and indeed it is not. Where the employer does not interpose cost as a defense, the union is plainly able to formulate its wage demands and to modify its wage demands without reference to their cost to the employer or the financial burden it places upon him. Information about the employer's financial condition, his wage costs or production costs, may be useful to a union. But to compel an employer to disclose his costs to a union on the theory that such information is *necessary* to a union

is to ignore the experience of the past thirty years. Collective bargaining has worked since 1935 without the broad disclosure that the court of appeals now tells us is necessary if effective negotiation is to take place.

Respectfully submitted,

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No. 373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

SYLVANIA ELECTRIC PRODUCTS, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

and

LOCAL 352, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR LOCAL 352, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	3
Statement of the Case	3
A. The Board's Findings of Fact	3
B. The Board's Decision and Order	8
C. The Court of Appeals Decision	8
Argument	10
1. There Is No Novel Standard Which Warrants Grant of the Petition With Respect to the Mandatory Subjects of Collective Bargaining	10
2. There Is No Conflict of Decisions Which Warrants Grant of the Petition	14
Conclusion	16

TABLE OF CASES

Boston-Herald Traveler Corp. v. *N.L.R.B.*, 233 F. 2d 58 (C.A. 1) 10-11

Curtiss-Wright Corporation v. *N.L.R.B.*, 347 F. 2d 61 (C.A. 3) 11

Inland Steel Co. v. *N.L.R.B.*, 170 F. 2d 247 (C.A. 7), cert. den. 336 U.S. 960, enf.'g 77 NLRB 1 10

International Woodworkers of America v. *N.L.R.B.*, 263 F. 2d 483 (C.A.D.C.) 11

N.L.R.B. v. *Feed & Supply Center*, 294 F. 2d 650 (C.A. 9), enf.'g 127 NLRB 276 10

Page

N.L.R.B. v. *John S. Swift Co.*, 277 F. 2d 641 (C.A. 7), enf.'g 124 NLRB 394 ..... 10, 15
N.L.R.B. v. *Otis Elevator*, 208 F. 2d 176 (C.A. 2) 12
N.L.R.B. v. *Truitt Manufacturing Co.*, 351 U.S. 149 .. 9, 14
N.L.R.B. v. *Whitin Machine Works*, 217 F. 2d 593 (C.A. 4), cert. den. 349 U.S. 905 11
N.L.R.B. v. *Woolworth Co.*, 352 U.S. 938, rev. 235 F. 2d 319 (C.A. 9) 10
Sylvania Electric Products v. *N.L.R.B.*, 291 F. 2d 128 (C.A. 1), cert. den., 368 U.S. 926 ..... 9, 10
Taylor Forge & Pipe Works v. *N.L.R.B.*, 234 F. 2d 227 (C.A. 7), cert. den. 352 U.S. 942 ..... 11, 13
W.W. Cross v. *N.L.R.B.*, 174 F. 2d 875 (C.A. 1), enf.'g 77 NLRB 1162 10

STATUTES:

National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151, et seq. 3
Welfare and Pension Disclosure Act of 1959, 72 Stat. 997, 29 U.S.C. Sec. 301 et seq. 9, 15

CONGRESSIONAL MATERIAL:

85 Cong. Rec. (1958), second session, (remarks of Congressman Dent) 16428 ..... 9, 12

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BRIEF FOR LOCAL 352, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO IN OPPOSITION

The opinion of the Court of Appeals (Pet. 1a-4a)[1] is reported at 358 F. 2d 581. The decision and order of the National Labor Relations Board, hereinafter

[1] "Pet." refers to the Petition.

called the Board, (J.A. 51-68)[2] is reported at 154 NLRB No. 149.

JURISDICTION

The decision and decree of the Court of Appeals (Pet. 1a-4a)[3] were entered on April 5, 1966. A petition for rehearing was denied on April 21, 1966. The petition for a writ of certiorari was filed on July 20, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Did the Court of Appeals correctly enforce the Board's decision and order that the Company violated its obligation to bargain in good faith with the duly certified and recognized bargaining representative of its employees by refusing during the course of negotiations to furnish the Union with the premium cost data of its proposed improvements and changes in an employee insurance program?

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[2] "J.A." refers to the Joint Appendix in the court below which has been filed with the petition.

[3] The reprinting of the decision in the petition omits the footnote citation to the holding of the case and should be corrected thus:

> "However, when the union makes the same demand in order to evaluate the desireability of an increase in welfare benefits as against an equivalent increase in take-home pay,[2] matters as to which the employer must bargain, the Board might properly conclude that the information, though collateral, was so necessary to effective negotiation that withholding it without good reason was inconsistent with the duty to 'exert every reasonable effort to make and maintain agreements.' *N.L.R.B.* v. *Truitt Mfg. Co.*, supra at 152, 76 S. Ct. at 755.
>
> "[2] Cf. 104 Cong. Rec. 16428 (1958) (Remarks of Rep. Dent)."

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are reprinted in the petition (Pet. 4a-6a).

STATEMENT OF THE CASE

A. The Board's Findings of Fact

This case arises out of negotiations between Sylvania Electric Products Inc., hereinafter called the Company, and International Union of Electrical, Radio and Machine Workers, AFL-CIO and its Local 352, hereinafter collectively called the Union, for a new collective bargaining agreement to succeed an agreement which would expire by its terms on September 30, 1964. The negotiations concerned solely the Batavia, New York, plant of the Company (J.A. 53-43).

Prior to the commencement of formal negotiations, the Union, by letter dated June 11, 1964, requested certain information from the Company concerning cost data in respect to the pension, insurance and savings security program (J.A. 55). With cover letter dated July 21, 1964, the Company furnished the Union with past and current pension and group insurance data, including payments made and actuarial assumptions, in the case of the pension plan, and claim and premium expenses, in the case of the group insurance program (J.A. 55).

Formal negotiations commenced on July 24, 1964, in a conference room of the Company's Batavia plant (J.A. 56). At this meeting the Company and the Union exchanged proposals for changes in the existing contract (J.A. 56). The Union's proposal included,

inter alia, improvements in the insurance and pension programs (J.A. 56).

With cover letter dated August 10, 1964, the Company made its economic offer to the Union (J.A. 56). The offer included, *inter alia,* changes in the pension and group insurance programs (J.A. 56). Following this written offer the parties met on August 12, 1964, at which meeting Peter Scibetta, the Chairman of the Union's Sylvania Conference Board, asked Joseph Gill, the Company's Manager of Industrial Relations at the Batavia plant, to break down the economic offer in terms of the hourly cost to the Company for all the items contained in the package[4] (J.A. 56-57). Gill replied that the Company never bargained on the basis of cost but bargained on the level of benefits (J.A. 56). Scibetta asked if the Company did not look at the cost to which Gill replied that he would not be sitting there if it did not look at costs but that he would not give the cost breakdown to the Union as the Company was not obligated to do so (J.A. 56).

The next negotiating meeting took place on September 8, 1964, after a three week vacation shutdown (J.A. 57). At this meeting Earl Kipp, Assistant Director of the Union's Pension and Insurance Department, presented and explained the suggested improvements the Union desired in the pension and insurance programs (J.A. 57). The Union continued the presentation of its proposals at the next two meetings held on September 11 and 16, 1964 (J.A. 57). At the latter

[4] The Company's statement in its petition that there was conflicting testimony as to whether any request for a cost breakdown was made prior to September 23 (Pet. 7) ignores the fact that the Trial Examiner made a finding, adopted by the Board, that Scibetta made such a request (J.A. 51, 56-57).

meeting Gill stated that the Union's economic demands were substantial and represented a sizable cost to the Company if it were to accept them (J.A. 57).

At the September 17 meeting, during a discussion of job evaluation challenges, Gill stated that the Union's suggested changes would represent a cost to the Company and that any change in the job evaluation system actually became a part of a wage package if the Company were to agree to it (J.A. 57). When Gill further commented that the Union's proposals on the job evaluation challenges would put the Company in a position of not being competitive, Scibetta asked for a cost breakdown and pointed out that the Union was there to represent people and not misrepresent them, that to put the Company in a noncompetitive position would only result in jobs being lost, and that that was certainly not representing people (J.A. 57-58).

Scibetta was absent from the next negotiation session held on September 23 and was replaced on the Union's negotiation team by a staff representative, Clifford Haley (J.A. 58). At the beginning of the meeting Haley requested the cost breakdown of the Company's package[5] to which Gill responded that the Company bargained on the level of benefits and not on cost (J.A. 58). McCready, the Local's vice-president, stated that she understood that the Company had attached a cost to the package and the Union was asking for it and was entitled to it (J.A. 58). Gill admitted that the Company did, of course, attach a cost to the package but still persisted in his position (J.A. 58). Haley then

[5] This request was made because prior to the beginning of the meeting Haley had been briefed by the other members of the negotiating team as to the prior negotiations and the problems they were having, including the need for cost information (J.A. 32).

asked for a breakdown of the comparative worth of the package at the Company's Buffalo plant and at Batavia; he stated that if there was a difference he would request the Company to spread the difference over the other benefits[6] (J.A. 58). Gill said that he would consider it but would not like to improve the package by thirty percent (J.A. 58). Haley then stated that he understood that the Company attached a cost to the pension package but that he did not consider it worth one-half a cent (J.A. 58). Gill again agreed that there was a cost to the pension package but said that the Union had to consider all the improvements and that it was a good package (J.A. 58-59).

Joy, another member of the Union's negotiation team and an employee at the Batavia plant, commented that he would just as soon take the insurance package in the previous contract and if there was any additional cost he would like to have the Company add it to the wage offer (J.A. 59). Another union committeeman stated that if the Company wanted the Union to sign the contract they would have to give the Union's negotiators something to sell (J.A. 59). The meeting adjourned after the Union's negotiators stated that they could not intelligently explain the Company's package to the employees unless they understood the package themselves and for that understanding they needed the cost information (J.A. 59). Prior to the adjournment the Company took a short recess and then informed

[6] The same economic package was offered to IUE Local 511 at the Company's Buffalo plant, but because the plant was older, with longer-service employees, the Union surmised that the cost of the pension plan improvements would be higher at Buffalo (J.A. 19-21). The Company conceded at the hearing that the age of the Buffalo group would have this effect upon the cost of the pension and vacation benefits (J.A. 45).

the Unions negotiators that they remained adamant in their refusal to furnish the information (J.A. 59).

On that same date the Union sent a formal written request for the cost information to the Company (J.A. 59) and the Company sent a written answer two days later refusing the request (J.A. 59-60). In the interim the Union filed the charges which began the instant proceeding (J.A. 60). On September 28 the parties met again, Scibetta again asked for the information and Gill again took the position that it was not going to give the Union the information and that the Union was not entitled to the information (J.A. 60). The parties reached agreement on a contract at 1:30 a.m. on the morning of October 1, 1964 (one and one-half hours after the prior agreement terminated).[7] After

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[7] The record is clear that the amount of wage increases was an issue in negotiations and it kept the parties from getting together sooner than they did (J.A. 50-51). In this respect the following colloquy between the Trial Examiner and a Company witness took place:

"Trial Examiner: Was there a specific dollar and cents request higher than the one which was finally agreed upon?

The Witness: Oh, yes.

Trial Examiner: Substantially?

The Witness: During the last two or three days of negotiations, the union officer requested a nickel an hour more. As I mentioned earlier, to make up for this so-called inequity between the Buffalo and Batavia plant.

Trial Examiner: And before that, was the request even more than that, higher than that, union's request higher than a nickel an hour?

The Witness: I believe that—I believe there was a request for three and a half or four per cent general wage increase. I'm a little vague on that.

Trial Examiner: Well, was wages then one of the issues which kept the parties from getting together sooner than they did?

The Witness: It certainly was a factor, yes?" (J.A. 50-51).

reaching agreement Scibetta was asked if the Union was going to pursue the charge to which Scibetta responded yes, that the Union did not want to be in the same position three years hence when this contract would expire (J.A. 61).

B. The Board's Decision and Order

The Board adopted the findings, conclusions and recommendations of the Trial Examiner (J.A. 51) that the Company violated Section 8(a)(1) and (5) of the Act by refusing to furnish to the Union the estimated cost of its proposed improvements in its noncontributory pension and insurance programs (J.A. 64). In reaching his conclusion the Trial Examiner made alternative findings. In the first place he followed the Board's rationale in earlier cases that premiums paid by a company under a non-contributory insurance program constitute "wages" concerning which bargaining is required by the Act and therefore premium cost data is directly related to the matter of wages (J.A. 61-62). In the second place he found that the record established that the Company itself made costs a relevant bargaining issue and therefore the Union was entitled to the information (J.A. 62-63).

C. The Court of Appeals Decision

The Court of Appeals enforced the Board's Order. It held that when a union, during the course of negotiations, requests the premium cost in the employer's *proposed changes* in welfare benefits in order to evaluate the desirability of such changes vis-a-vis an equivalent increase in take-home pay, the Board might properly conclude that such information was so necessary to effective negotiation that withholding it was incon-

sistent with the employer's duty to bargain. In support of its holding the court cited this Court's decision in *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149, and cited a reference to the remarks of Representative Dent (footnote 3 *supra*) during the debate over the scope of the Welfare and Pension Disclosure Act of 1959 (72 Stat. 997, 29 U.S.C. Sec. 301 et seq.). In rejecting a distinction between contributory and noncontributory welfare plans the Congressman stated,

> "The assumption is that the employer is paying for it and, therefore, the employee who is a participant has no equity in the plan. That is not true of any welfare or pension plan in existence in the country today. There is no such thing as a giveaway plan in which an employer gives anything to anybody. In every instance, whether it is a matter of negotiations across the bargaining table, an agreement, or if it is merely mentioned in the employment contract, if such a contract is in effect, or in the mere act of employment of a person by an employer who has a benefit plan, *there is an assumption that a certain amount of money is given in lieu of wages by containing that man's welfare in a welfare plan* of some kind, whether it be pension, hospitalization or other plan covered by this bill" (At. p. 16428). (Emphasis supplied).

The court distinguished its earlier decision in *Sylvania Electric Products, Inc.* v. *N.L.R.B.*, 291 F. 2d 128, referred sometimes herein as the first *Sylvania* case, in which it held that while the *benefits* of noncontributory plans were "wages" within the meaning of the National Labor Relations Act, the premium costs were not wages and that the union (in that case the Steelworkers) was not *per se* entitled to the premium cost data of past and current benefits. In the instant case, the court distinguished the duty to dis-

close past and current premium data in order for the union to determine whether the employer was obtaining the best coverage for the money, as in the first *Sylvania* case, and the duty to disclose the premium costs of proposed changes in pension and insurance benefits in order for the union to evaluate the desireability of an increase in such benefits rather than equivalent economic increase in take-home pay.

ARGUMENT

1. There Is No Novel Standard Which Warrants Grant of the Petition With Respect to the Mandatory Subjects of Collective Bargaining

The Company's first position in support of its Petition, i.e. that the decision below erases the distinction between mandatory and nonmandatory subjects of bargaining, is totally incorrect. The facts of this case concern bargaining over pension and insurance benefits which the Board and Court of Appeals have long found were mandatory subjects of collective bargaining. E.g., *Inland Steel Co.* v. *N.L.R.B.*, C.A. 7, 170 F. 2d 247, cert. den. 336 U.S. 960, enf.'g 77 NLRB 1; *W. W. Cross & Co.* v. *N.L.R.B.*, C.A. 1, 174 F. 2d 875, enf.'g 77 NLRB 1162; *N.L.R.B.* v. *John S. Swift Co.*, C.A. 7, 277 F. 2d 641, enf.'g 124 NLRB 394; *N.L.R.B.* v. *Feed & Supply Center*, C.A. 9, 294 F. 2d 650, enf.'g 127 NLRB 276. More specifically it involves the failure of the Company to furnish information relevant to an intelligent choice of increases in such benefits vis-a-vis an increase in direct take-home pay, both of which are mandatory subjects of collective bargaining.

This Court (*N.L.R.B.* v. *F. W. Woolworth Co.*, 352 U.S. 938) and the various Court of Appeals (E.g., *Boston-Herald Traveler Corp.* v. *N.L.R.B.*, C.A. 1,

233 F. 2d 58; *Taylor Forge & Pipe Works* v. *N.L.R.B.*, C.A. 7, 234 F. 2d 227, cert. den. 352 U.S. 942; *N.L.R.B.* v. *Whitin Machine Works,* C.A. 4, 217 F. 2d 593, cert. den. 349 U.S. 905; *International Woodworkers of America* v. *N.L.R.B.,* C.A.D.C., 263 F. 2d 483, 484) have followed the Board's rule that if the information sought relates to the wages or fringe benefits of the employees, the information is obviously related to the bargaining process and the employer's refusal to furnish the information, without more, violates its obligations to bargan under Section 8(a)(5). As stated by the Third Circuit,

> "Without the disclosure of relevant information both contract negotiations and the institution of grievance and arbitration procedures under existing agreements would be hampered. Merely meeting and conferring without a prior exchange of requested data, where such is relevant, does not facilitate *effective* collective bargaining and, therefore, does not meet the requirements of Section 8(a)(1) and (5). Because of the need to facilitate effective collective bargaining, a refusal to furnish data is an unfair labor practice notwithstanding the good faith of an employer in rejecting the request." *Curtiss-Wright Corp.* v. *N.L.R.B.,* 347 F. 2d 61, 68.

The Company relies upon *International Woodworkers of America* v. *N.L.R.B.,* 263 F. 2d 483, in support of its proposition that the matters involved are outside the realm of mandatory bargaining (See Pet. 15). However, the Court of Appeals for the District of Columbia drew a distinction between wage information and sales and production information. In that case the court held that a union is *per se* entitled to wage information and, depending upon the circumstances of

the particular case, may also be entitled to the latter information. Whether the "benefits" or the "premium costs", or both are wages within the meaning of the Act,[8] the welfare program itself is a mandatory subject of bargaining in contrast with the employer's production and sales programs. As the welfare program is a mandatory subject of bargaining, the exclusive bargaining representative of the employees must be entitled, *per se,* to the relevant information of that program, including the cost data which make the program and the offered change meaningful.

In the instant proceeding, the Company presented the Union with an economic package, including a wage increase, increased vacation for certain employees, an additional holiday, increases and modifications in health and hospitalization insurance, and increased life insurance and pension benefits (J.A. 155-172). No item in this offer represented a "gift" from the Company but involved the consideration for the labor and services of the employees (See comments of Congressman Dent, *supra,* p.). To the extent that any item of this offer was in any form other than dollars, the Union was entitled to have the form translated into dollar terms in order that it might, as in the instant case, determine whether it preferred the allegedly nonmonetary benefits or straight take-home pay. Otherwise, the offer was unintelligible. In the interest of collective bargaining employers have been ordered to furnish unions with the details of the job evaluation

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[8] Although the Board and the Union urged as an alternative argument in the court below that the concept of "wages" included the premiums paid as well as the benefits, it was unnecessary to decide that issue on the facts of the instant case as found by the Board and the court.

system utilized in fixing incentive standards (*N.L.R.B.* v. *Otis Elevator,* 208 F. 2d 176, C.A. 2) and have been ordered to furnish "point ratings" used in determining each employee's rate of pay (*Taylor Forge & Pipe Works* v. *N.L.R.B.,* 234 F. 2d 227, C.A. 7). In both cases *actual* wages would not be otherwise understandable. The same applies to welfare and pension programs offers in negotiations.

The Company obviously does not, and can not quarrel with the fact that wages is a mandatory subject of collective bargaining. In the instant case the Union had requested a larger increase in weekly wages; the Company conceded that it was one of the issues which prevented an earlier agreement. The Union's negotiators, *albeit* willing to take a larger increase rather than the new fringe benefits, had no way of knowing the amount of extra cents per hour represented by the offered additional fringe benefits.[9] The court below was correct in concluding that the information requested was relevant to effective negotiation and the refusal to divulge the information was a violation of the Company's duty to bargain.

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[9] The Union's representatives could not calculate these figures as such items as contingency reserves are unknown factors in such calculations. It should be noted that the Company conceded at the hearing that it hires an actuary to compute the estimated cost of its insurance and pension program and that it takes the estimated cost (which it believes reliable) into account in arriving at the level of benefits it offers the Union at the bargaining table (J.A. 48-49).

2. There Is No Conflict of Decisions Which Warrants Grant of the Petition

In support of its contention that this Court's decision in *N.L.R.B.* v. *Truitt Manufacturing Co.*, 351 U.S. 149, was incorrectly cited in support of the holding in the instant case, the Company ignores the findings of fact of the Trial Examiner and the Board that cost indeed was injected into the negotiations. Thus, after the Union made certain requests for changes in the job evaluation system, the Company responded that any such changes would become a part of a wage package if the Company were to agree to them and that the Union's proposals *would* put the Company in a position of not being competitive (J.A. 57-58). To these statements the Union responded with a cost breakdown request in order that it might represent and not misrepresent the employees (J.A. 58). This request was rejected. Similarly, after the Union requested the cost breakdown of the package at the Buffalo plant as compared with the Batavia plant in order that it might spread the difference over other benefits, the Company responded that it *could not* improve the package by 30 percent (J.A. 58). In this factual context, which the court below did not reject, the court was not in error in citing the opinion of this Court in *N.L.R.B.* v. *Truitt Manufacturing, supra*, in support of its holding that the Board might properly conclude that the withholding of the information was inconsistent with the Company's duty to bargain.

Further, there is no conflict of decisions with other circuits. Thus, the decision of the court below that the Union was entitled to this information comports with the decision of the Court of Appeals for the Seventh

Circuit in N.L.R.B. v. *John S. Swift Co.*, 277 F. 2d 641. In that case the Seventh Circuit found that the failure to furnish a breakdown as to the cost of a health and welfare plan was violative of an employer's duty to bargain. The Company cites no decision in any other circuit, and we can find none, in support of its proposition that the Union is not entitled to cost data of offered changes in a welfare and pension plan during the negotiations for a new collective bargaining agreement.

Finally, there is no conflict with any other decision of the court below as asserted by the Company. Whether or not the court was correct in the earlier *Sylvania* case to the effect that the Company was not *per se* obligated to furnish the Steelworkers with the past and current cost breakdown of its pension and insurance benefits,[10] the instant case involved offered changes in the program as part of an economic package, cost was made a factor in the negotiations by the Company, and the Union was denied the opportunity to make an intelligent choice of the acceptance or rejection of the offer of the increase in these fringe benefits vis-a-vis a desired increase in take-home pay. Under these circumstances the Court was correct in concluding that its own earlier decision was distinguishable.

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[10] The information denied to the Steelworkers in the earlier Sylvania case was furnished to the Union in the instant case. After the negotiations underlying that earlier case were completed the Welfare and Pension Disclosure Act of 1959, 72 Stat. 997, 29 U.S.C. Sec. 301 et seq. went into effect. The issues in that case involving past and current cost data became moot as the information was thereafter a required part of the public record.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should in all respects be denied.

Respectfully submitted,

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